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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)	Case No.: CR 2017-00516
)	
Plaintiff,)	MOTION TO PRECLUDE
)	WITNESSES FROM
v.)	TESTIFYING RE
)	TRAJECTORY OR POSITION
ROGER DELANE WILSON,)	OF PARTIES INVOLVED
)	
Defendant.)	Assigned to Judge Conlogue
)	

COMES NOW the Defendant, ROGER D. WILSON, by and through his attorney, STEVEN D. WEST, and hereby moves to preclude the State's use of any testimony from either the medical examiner or police officers relating to the actual trajectory of the ammunition that was used in the shooting in this case and/or the position of either the shooter or victim, because there is lack of foundation and expertise in this area to allow this type of testimony.

This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

The defendant has been charged with the first degree murder (and other charges) of J.D. Arvizu. Mr. Arvizu was allegedly shot while at or near the back of Mr. Wilson's truck, standing outside of a vehicle, and Mr. Wilson, who was also standing outside of the vehicle, was somewhere to the side.

Before the grand jury and at other times, at least one of the officers involved indicated a "theory" that Mr. Arvizu was sitting or kneeling at the time that he was shot. This was purportedly based on the angle that was stated in the autopsy report as the path of the bullet being "downward." There was no other explanation or description of the path of the bullet.

Notwithstanding the fact that no officer has any expertise in this area, clearly the medical examiner is able to testify about the path of the bullet in the victim's body. However, he too has absolutely no expertise relating to trajectory of the bullet and/or placing the shooter and/or the victim in specific positions, which would have caused that trajectory. This type of testimony is based solely on conjecture. The State has failed to establish any foundation nor is it able to do so, in order to allow

the introduction of such testimony through any witness.

STATEMENT OF LAW

Rule 702 of the *Arizona Rules of Evidence* provides that an expert may testify about “scientific, technical, or other specialized knowledge” which will assist the jury to understand the evidence “or to determine a fact in issue.” The rule goes on to state that the witness must be qualified as an expert “by knowledge, skill, experience, training, or education” in order to testify and give an opinion on the issue.

The medical examiner is a doctor, and he is qualified to testify about the medical aspects of the autopsy, and/or how a bullet caused damage to the internal organs of the body. However, he is not an expert on bullet trajectory and crime scene investigation relating to the positioning of a shooter in relation to a victim at the time of a crime. His testimony in this area would amount to pure speculation. In addition, the same factors are present for any law enforcement officer to make statements about his beliefs relating to the positions of the shooter and the victim.

Expert testimony must satisfy the requirements of *Rule 702*, which provides that the expert’s opinion be based on **sufficient facts and data** to provide an opinion. However, an expert cannot express an opinion in a second area, when expertise is not established in that area. *United States v. Chang*, 207 F.3d 1169, 1171-1174 (9th Cir. 2000) (affirming the exclusion of an international finance expert’s testimony, because

he lacked expertise in that area).

Even assuming *arguendo* that the court would allow the testimony of law enforcement to touch this area,¹ the trial court should not admit expert testimony which “quantifies the probabilities of the credibility of another witness.” *State v. Herrera*, 226 Ariz. 59, 70, 243 P.3d 1041 (App. 2010), quoting *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). In the instant case, Dr. Winston, who performed the autopsy, would not necessarily be quantifying the testimony of other witnesses, but he would be supporting the State’s theory through a form of vouching, and he would be invading the province the jury, whose duty it is to determine the facts. Dr. Winston’s testimony must not relate to issues that necessarily remain solely within the province of the jury.

The information relating to trajectory of the bullet prior to entering the victim’s body and the position of the shooter in relation to the victim, are not facts that can be based on Dr. Winston’s expertise, and he should not be permitted to state evidence of this nature without a proper foundation in the field of bullet trajectory. Dr. Winston cannot be permitted to use his expertise as a medical doctor to give ultimate conclusions in this area.

¹The defense does not believe that the testimony of the officers can occur, because of a total lack of foundation for the State to even ask the questions relating to this information, which would, even if admissible, would warrant only expert testimony.

As the gatekeeper, the court must determine whether the testimony relating to the bullet trajectory is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). There is no question that it would be relevant. However, the testimony coming from a non-expert in that field, would deem it unreliable.

Dr. Winston would not be using any recognized, expert methodology in drawing his conclusions. See *Daubert*, 509 U.S. at 592-593. He would be basing his conclusions independently of any type of data normally relied upon by experts in the field of bullet trajectory.

WHEREFORE the Defendant moves to preclude any law enforcement officers and/or the Medical Examiner from testifying to any issue relating to the trajectory of the bullet, that killed Mr. Arvizu, or any information that would tend to show how the shooter and/or victim were positioned at the time of the shooting.

RESPECTFULLY submitted this 11th day of July, 2019



Steven D. West
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Copy of the foregoing
mailed/delivered this date to:

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